Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HUGH STEWART, KAMERON HYDE AND SHERRY HORN,
Petitioners,

v.

THE BIRMINGHAM NEWS COMPANY,
Respondent.

On Petition For Writ Of Certiorari
To The Alabama Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the standard to be applied in determining the reach of the Federal Arbitration Act is the "substantial effect on interstate commerce" standard enunciated by this Court in *United States v. Lopez* and reaffirmed in *United States v. Morrison?*

If so, whether the performance of a contract between a local newspaper and local independent distributors providing for the intrastate local delivery of newspapers has the requisite substantiality of effect on interstate commerce so as to justify application of the Federal Arbitration Act?

PARTIES TO THE PROCEEDING

All parties to the proceedings in the Alabama Supreme Court are reflected in the caption of the case.

RULE 29.1 LISTING

Petitioners, plaintiffs below, are Hugh Stewart, Kameron Hyde and Sherry Horn. They are individuals, having no parent corporations nor any nonwholly owned subsidiaries.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

Hugh Stewart, Kameron Hyde and Sherry Horn,
Petitioners,

v.

The Birmingham News Company, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

Hugh Stewart, Kameron Hyde and Sherry Horn respectfully petition for a writ of certiorari to review the judgments of the Alabama Supreme Court in this case.

OPINIONS BELOW

The opinions of the Alabama Supreme Court (App. A1-A18, A31-A32) are not yet reported. The opinions of the Circuit Court of Jefferson County, Alabama (App. A26-29, A30, A33-A36) are unreported.

JURISDICTION

The Alabama Supreme Court entered its judgment in the *Stewart* and *Hyde* cases on September 22, 2000. (App. A18). The Alabama Appellate Court denied a timely application for rehearing on December 1, 2000. (App. A19). The Alabama Supreme Court entered its

judgment in the *Horn* case on November 3, 2000. (App. A31). The court denied a timely application for rehearing on February 23, 2001. (App. A37). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides that "Congress shall have power ... [t]o regulate Commerce with foreign nations and among the several States." U.S. CONST. art. I, § 8.

Relevant portions of the Federal Arbitration Act ("the FAA"), 9 U.S.C. § 1, *et seq.*, are reproduced in the Appendix, infra, App. A31-32.

STATEMENT OF THE CASE

The dispute in these cases arises out of the termination of independent dealer contracts for the local distribution of newspapers. Respondent, The Birmingham News Company ("The News"), is an Alabama corporation engaged in the business of publishing certain newspapers, including *The Birmingham News ("The News")*. Petitioners, who are residents of the State of Alabama, are independent dealers authorized to act as the exclusive distributors of *The News* in specific geographic districts in Birmingham, Alabama. The contracts between the parties require the petitioners to purchase newspapers from The News and then resell the newspapers to customers within the specific geographic district. At issue is whether the performance of the contract between petitioners and The News has the requisite substantiality of effect on interstate commerce so as to justify application of the Federal Arbitration Act.

A. Distribution of the News

As part of its role as publisher, The News purchases paper, ink, news content, advertisements, supplies and product samples from various companies located outside the State of Alabama. The publishing process, which involves transforming these raw materials into newspapers, takes place at The News's principal place of business in Alabama. The newspaper is then distributed to customers through a mixed distribution system consisting of independent dealers such as Hugh Stewart, Kameron Hyde and Sherry Horn and employees or agents of The News.

Independent dealers are authorized to act as the exclusive distributors of *The News* only within specific geographic districts in Birmingham, Alabama. These dealers purchase newspapers from The News and then resell the newspapers to customers within the specific geographic district. This system has been in place for many years, and dealerships have attained substantial value. The News permits dealers to sell their exclusive dealerships pursuant to the conditions set forth in an Independent News Dealer Agreement.

B. The Agreement

Petitioners purchased for valuable consideration The News local delivery and rack distributorships for certain districts in Birmingham, Alabama, from other independent distributors. Thereafter, each petitioner executed an Independent News Dealer Agreement with

The News (the "Agreement").[1] The Agreement had a term of one year, and The News and petitioners executed additional Agreements thereafter. The Agreements were executed in Birmingham, Alabama.

The Agreement required petitioners to purchase from The News a sufficient number of newspapers and to distribute these newspapers for local delivery to customers. The Agreement provided:

> Newspaper agrees to sell, and News Dealer agrees to buy a sufficient number of copies of said newspaper to supply all customers at news-stands, stores, newsracks or other places where newspapers may be sold, and all subscribers to single copy home delivery of newspapers published by Newspaper, and newspapers for which Newspaper is the agent for distribution ... within the zip code including the area for which News Dealer is primarily responsible.

The Agreement details the independent nature of the relationship between petitioners and The News. Petitioners were given the full and exclusive right to deter-

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[1] With the exception of the dates of their execution and expiration, the Agreements signed by petitioners are identical. Kameron Hyde purchased his distributorship in 1994; Hugh Stewart purchased his distributorship in 1988; and Sherry Horn purchased her distributorship in 1993. The preamble to Kameron Hyde's Agreement provides:

> THIS AGREEMENT made and entered into on the 31st day of October, 1997, by and between THE BIRMINGHAM NEWS COMPANY, a corporation duly created and existing under the laws of the State of Alabama and having its principal place of business at 2200 Fourth Avenue North, Birmingham, Alabama ..., and Kameron Hyde ..., doing business at Hoover/Lorna Road, Alabama.

mine the mode and manner in which newspaper deliveries to customers were to be made. The Agreement further provided:

> News Dealer shall make regular and prompt deliverys [sic] on the date of publication of complete newspapers intact, including preprints, supplements, and inserts designated by Newspaper only, to his subscribers and customers in a manner satisfactory to them (e.g. in a dry and readable condition). News Dealer shall pick up all newspapers from Newspaper in bulk at the agreed pickup point(s) .... News Dealer shall determine the manner in which he/she will reach the addresses of the subscribers and transport the newspaper....

C. Intrastate Contacts

Petitioners performed all of their duties relative to the Agreement in Alabama. Petitioners purchased and accepted delivery of assembled newspapers from The News at its principal place of business in Alabama. Petitioners hired local carriers to help deliver the newspapers. They then supervised and/or participated in the delivery of these newspapers to their customers, utilizing their own automobiles to transport the newspapers. They neither sold newspapers outside the state nor did they collect monies from customers living outside the state. Petitioners never purchased supplies from any company outside the State of Alabama. They purchased polyethylene bags and rubber bands for packaging the assembled newspapers directly from The News.

In 1997, The News made changes to its distribution system that adversely affected petitioners' abilities to function properly under the Agreement. One of the changes was to its customer-rating procedures. The

change caused dealers to be held responsible for complaints about service problems over which they had no control. In September of 1998, The News unilaterally terminated its relationship with petitioners by failing to renew their Agreements.[2] The News then hired individuals to distribute newspapers in petitioners' exclusive geographic districts. The News no longer has independent dealers involved in the distribution of newspapers in petitioners' former districts.

D. The Lawsuits

On July 30, 1999, petitioners filed complaints against The News in the Circuit Court of Jefferson County, Alabama. *Hugh Stewart v. The Birmingham News Company*, CV-99- 4313; *Kameron Hyde v. The Birmingham News Company*, CV-99-4314; *Sherry Horn v. The Birmingham News Company*, CV-99-4323. Petitioners' complaints asserted various state-law contract and tort claims. Petitioners contended that they purchased their distributorships in reliance upon representations made by The News that the Agreement between the parties would be maintained as long as petitioners performed their duties satisfactorily. Petitioners further contended that The News engaged in a scheme designed to eliminate local dealers who were independent of The News, to appropriate the fair market value of the dealers' business without compensation, to provide The News with a monopoly in the retail and publishing market and to increase its own profitability.

The News moved to stay the proceedings and to compel arbitration pursuant to an arbitration provision in the Agreement. The arbitration provision provided

[2] The News terminated Stewart's Agreement and failed to renew Horn's and Hyde's Agreements.

that "all claims and controversies arising out of this contract shall be submitted to arbitration for determination." In the *Hyde* and *Stewart* cases, the circuit court granted the motions to compel arbitration and stayed the proceedings pending arbitration. The circuit court found that one of the expressed purposes for distributing newspapers was to provide a means for advertisers to solicit customers. As a result, the court concluded that the Agreement had the requisite effect on interstate commerce to justify application of the FAA. In the *Horn* case, the circuit court denied the motion to compel arbitration. The circuit court recognized that there was a flow of commerce from sources outside Alabama to The News, but nonetheless concluded that petitioners had sufficiently established that the flow of commerce did not extend to the Dealer Agreements between the parties.

On December 2, 1999, Stewart and Hyde sought a writ of mandamus from the Alabama Supreme Court directing the trial court to vacate its order compelling arbitration of their claims against The News. On January 4, 2000, The News filed a notice of appeal to the Alabama Supreme Court in the *Horn* case.[3]

E. The Alabama Supreme Court's Decisions

Petitioners contended that nothing in the Dealer Agreement indicated that the transaction at issue involved interstate commerce within the meaning of the

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[3] Pursuant to Alabama law in effect at the time, a ruling granting a motion to compel arbitration was reviewable by mandamus. *Ex parte Alexander*, 558 So. 2d 364 (Ala. 1990). *But see Jack Ingram Motors, Inc. v. Ward*, 768 So. 2d 362 (Ala. 1999). Denial of a motion to compel arbitration is reviewable by appeal. *A. G. Edwards & Sons, Inc. v Clark*, 558 So. 2d 358 (Ala. 1990).

FAA. All of the component parts of the newspaper were presumably obtained by The News in interstate commerce. Petitioners purchased the complete newspaper prepared by The News and then resold the complete newspaper locally. Petitioners argued that the circuit court erred by focusing on the overall business of The News rather than the limited transactions encompassed within the Agreement. The News argued that petitioners were an integral part of a system for delivering commercial advertising distributed in interstate commerce.

The court had previously recognized the three categories of regulation subject to the power of Congress under the Commerce Clause described by Chief Justice Rehnquist in *United States v. Lopez*, 514 U.S. 549 (1995) in the case of *Sisters of the Visitation v. Cochran Plastering Co.*, No. 1981513, 2000 WL 264243 (Ala. March 10, 2000). In *Sisters of the Visitation*, the Alabama Supreme Court acknowledged that the involving interstate commerce requirement merited a new level of scrutiny as a result of this Court's holding in *Lopez*. The court inferred that the FAA's requirement that a contract including an arbitration provision "involve" interstate commerce must now substantially affect interstate commerce.[4] Chief Justice Hooper, along with

[4] The court acknowledged that *Lopez* did not overrule *Wickard v. Filburn*, 317 U.S. 111 (1942), which held that farmers' consumption of their own wheat has sufficient effect on interstate commerce to bring them within federal statutes restricting wheat production. But, reading *Wickard* in light of *Lopez*, the court found that whether an action is local or interstate "is to be determined by considering how critical the regulation of all similarly situated persons activity is to the accomplishment of the primary purpose of a statute drawn to regulate an activity clearly having a substantial effect on interstate commerce." *Sisters of the Visitation*, *4.

Justices Maddox and See, dissented. Chief Justice Hooper concluded that this Court's analysis in *Lopez* was not applicable to arbitration cases. *Id.* at *12.

On September 22, 2000, in a per curiam opinion, a divided Alabama Supreme Court denied the mandamus petition in the *Stewart* and *Hyde* cases. Instead of following this Court's holdings in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) and its own holding in *Sisters of the Visitation*, the court chose to rely on two antitrust cases, *Lorain Journal Co. v. United States*, 342 U.S.143 (1951) and *Evening News Publ'g Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir. 1959), cert. denied, 360 U.S. 929 (1959). The court concluded that while the immediate actions of newspaper distribution only involved intrastate commerce, such actions were a part of a much larger "flow" of interstate commercial activity and that petitioners "were integral and inseparable parts of the flow of interstate commerce." (App. A9). As a result, the court found that the circuit court properly directed arbitration pursuant to the arbitration provisions in the Agreements. *Id.*

Justice Lyons, along with Justices Cook and England, dissented. Justice Lyons noted that the per curiam opinion could not be reconciled with this Court's holdings in *Lopez* and *Morrison*. He also pointed out that the case for applying *Wickard*'s aggregation principle was not as compelling in regard to the FAA as it was in regard to statutes purporting to control prices or prevent monopolies. (App. A13). "The [United States Supreme] Court's describing *Wickard* as the 'most far reaching example' .... suggest[s] that *Wickard* is not a standard to be trotted out and applied willy-nilly whenever Congress attempts to regulate activities in inter-

state commerce." (App. A12). Justice Lyons was unable to conclude that the performance of the contract had the requisite substantiality of effect on interstate commerce so as to justify applying the FAA. "To hold otherwise would assume that the framers of the United States Constitution intended that Congress could require arbitration of a contract between a local newspaper and a young person in the neighborhood who throws papers from his or her bicycle." (App. A18).

Justice Houston concurred specially, to express his opinion "I go with the flow." (App. A9). Justice Houston concluded that "neither the words nor the reason of the majority opinion in *Sisters of the Visitation* [and *Lopez* and *Morrison*] has any precedential value in a case involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity." (App. A10).

On November 3, 2000, the Alabama Supreme Court reversed the circuit court's order in *Horn* denying the motion to compel arbitration. (App. A31). The appellate court summarily reversed the order on the authority of *Ex parte Stewart* and remanded the case to the circuit court for an order granting the motion to compel arbitration.

The Alabama Supreme Court denied the applications for rehearing in the *Stewart* and *Hyde* cases on December 1, 2000, and in the *Horn* case on February 23, 2001. (App. A19-A25, A37).

REASONS FOR GRANTING THE WRIT

1. The Alabama Supreme Court's Decisions Resolved a Federal Question in a Manner that Conflicts with Decisions of this Court.

If an arbitration agreement concerns a transaction involving interstate commerce, then the FAA applies and preempts state law. 9 U.S.C. § 2. If the contract does not involve interstate commerce, then state law controls. *Southland v. Keating*, 465 U.S. 1, 10 (1984). In *Allied-Bruce Terminix Cos. v. Dodson*, 513 U.S. 265 (1995), this Court held that for an arbitration clause to be enforceable under the FAA, the transaction to which the contract relates must involve interstate commerce regardless of the contemplation of the parties. In reaching this conclusion, the Court held that "involving commerce" under the FAA was the functional equivalent of "affecting commerce" and that the phrase should be read broadly to permit a reach coinciding with that of the Commerce Clause.[5] *Id.* at 273.

The "involving commerce" requirement now merits scrutiny because of this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). Those cases firmly established that the Commerce Clause limits Congress's reach to matters that "substantially affect" interstate commerce. Yet the Alabama Supreme Court's decisions below were not based upon findings of a substantial effect on interstate commerce. Instead, the court concluded that the local distribution of newspapers involved interstate commerce because the distribution

[5] The Commerce Clause delegates to Congress the power to regulate commerce among the several states. U.S. CONST. art. 1, § 8.

was a part of a much larger "flow" of interstate commercial activity and that the flow of interstate commerce did not end when the newspaper was assembled after publication. This holding conflicts with *Lopez* and *Morrison*.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court considered the extent of interstate involvement an activity must have in order for it to be within the bounds of Congress's authority under the Commerce Clause. In *Lopez*, the Court struck down the conviction of a boy who had brought a handgun to school, holding that the Gun Free School Zones Act, 18 U.S.C. § 922(q), exceeded Congress's power to legislate under the Commerce Clause. The Government unsuccessfully argued that possession of a gun near a school might lead to violent crime, which would disrupt education, and that education was necessary for the nation's economic productivity. The Court held that the Act's relationship to commerce was too tenuous to withstand constitutional scrutiny. 514 U.S. at 567.

In reaching this conclusion, the Court explained that there are three categories of activities that Congress has properly regulated under the Commerce Clause: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *Id.* at 558-59. As to that third category, the Court acknowledged that the case law was unclear as to whether an activity must "affect" or "substantially affect" commerce in order to be within Congress's reach under the Commerce Clause. The Court concluded that the proper test requires that the regulated activity "substantially affect" commerce. *Id.* at 557.

It is this third category which is implicated here. The *contract at issue in this case* does not entail use of channels of interstate commerce nor regulation and protection of the instrumentalities of interstate commerce. (App. A11). Thus, unless the contract has a substantial relation to interstate commerce, it should not be regulated by federal law.

It has been six years since this Court announced in *Lopez* that there was an outer limit to Congress's Commerce Clause power, and that the Court would police that limit. A majority of this Court recently affirmed its commitment to policing that limit in *United States v. Morrison*, 529 U.S. 598 120 S. Ct. 1740 (2000). In *Morrison*, this Court held that Congress lacked the authority under the Commerce Clause to enact the Violence Against Women Act, 42 U.S.C. § 13981, which gave rape victims and battered spouses a federal cause of action to sue their attackers.

Morrison refined the third category of interstate activity and provided further analytical guidance for recognizing a substantial effect on interstate commerce. This Court looked to four additional factors to determine whether the Congressional act at issue substantially affects interstate commerce. 120 S. Ct. at 1749-1750. Courts are directed to inquire (1) whether the statute regulates commerce or an activity that might be deemed an economic activity; (2) whether the statute has an "express jurisdictional element" that restricts its application to activities that have "an explicit connection with or effect on interstate commerce"; (3) whether congressional findings support the judgment that the activity in question has a substantial effect on interstate commerce; and (4) whether there is a link between the activity and a substantial effect on interstate com-

merce that is not so attenuated that the federal-state balance is destroyed. *Id.*

First, the reviewing court should consider the commercial or economic nature of the regulated activity.[6] If the activity is neither commercial nor an essential part of a larger regulation of some commercial activity, then that activity cannot be regulated under the Commerce Clause. The Court found that in both *Lopez* and *Morrison*, neither the actors nor the conduct of the regulation had a commercial character and neither the purpose nor the design of the statute had an evident commercial nexus.[7] If the intrastate activity is either commercial or its regulation is necessary to the regulation of a commercial activity, then a reviewing court must inquire into the second subpart.

Second, the *Morrison* Court determined that the lack of an express jurisdictional element in the *Lopez* statute weakened the claim that Congress was acting within its Commerce Clause powers.[8] "Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." 120 S.

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[6] The Court used the words "economic" and "commercial" interchangeably.

[7] In both *Lopez* and *Morrison*, the financial effects of the prohibited conduct were not disputed. It is apparent that the Court examined the prohibited conduct without reference to its economic effects.

[8] "While the [FAA] creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction...." *Southland v. Keating*, 465 U.S. 1, 13 n.9 (1984). *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). See also *Allied-Bruce Terminix Cos. v. Dodson*, 513 U.S. 265, 290 (1995)(Thomas, J., dissenting)(Section 2 of the FAA does not give rise to federal question jurisdiction).

Ct. at 1750. Third, the Court found that while Congress was not required to make formal findings regarding the effect on interstate commerce, "the existence of such findings may 'enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.'"[9] *Id.* at 1750 (quoting *Lopez*, 514 U.S. at 553). Finally, the Court cautioned against accepting an "attenuated" connection between the regulation and the interstate activity. *Morrison*, 120 S. Ct. at 1750. The Alabama Supreme Court's opinion in this case conflicts with the first and fourth factors.

A. The Economic Activity of the Local Delivery of Newspapers Does Not Substantially Affect Interstate Commerce.

In *Lopez* and *Morrison*, this Court stressed the importance, in decisions delineating the scope of federal power under the Commerce Clause, of a particularized inquiry into the relationship between the economic activity being regulated and interstate commerce. "[D]epending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565. Thus, the commerce power is limited to laws affecting "a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561.

The decision of the Alabama Supreme Court demonstrates how courts can evade the holding of *Lopez* by categorizing conduct at an exceedingly high level of generality. Rather than looking to the particular subject of the regulation at issue to determine whether the

[9] The legislative history to the FAA is ambiguous. *Southland*, 465 U.S. at 7.

aggregate effects of the local delivery of newspapers substantially affected interstate commerce, the lower court focused on the commercial effects of newspaper publication in general. The relevant inquiry, however, is not the aggregate commercial effects of newspaper publication, but the aggregate commercial effects of local delivery of the newspaper. Though the local delivery of newspapers is commercial, it is certainly not interstate. See *Jones v. United States*, ___ U.S. ___, 120 S.Ct. 1904 (2000)(property occupied and used by its owner not for any commercial venture, but as a private residence, did not fall within coverage of federal arson statute and fact that residence was used in the interstate receipt of natural gas, a mortgage and an insurance policy did not bring it within the ambit of the statute).

This inquiry is entirely consistent with *Wickard v. Filburn*, 317 U.S. 111 (1942). In that case, the Secretary of Agriculture assessed a penalty on an Ohio farmer for harvesting more wheat than was allotted under the Agricultural Adjustment Act of 1938. Because the penalty was calculated on the basis of wheat grown solely for on-farm consumption, the farmer challenged the application of the Act, contending that such wheat was not part of interstate commerce. This Court rejected that argument, not on the ground that agricultural transactions as a whole substantially affect interstate commerce, but based upon a particularized inquiry into the aggregate commercial effects of on-farm wheat production. 317 U.S. at 125-127. Noting that an individual farmer's "contribution to the demand for wheat may be trivial by itself," the Court found it dispositive that such a contribution, when "taken together with that of many others similarly situated, is far

from trivial. *Id.* at 127-128. Viewed as a whole, "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Id.* at 128. Even "assum[ing] that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."[10] *Id.*

Even under *Wickard*'s reasoning, "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, the relevant focus is not on the aggregate commercial effect of the *class of activity* to which the regulated activity belongs, but on the aggregate commercial effect of the *specific* activities at issue in the case.[11] Rather than look to the contract and the specific activity at

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[10] The statute in *Wickard* was part of Congress's effort to deal with the economic depression affecting the Nation at that time. Similarly, Title II of the 1964 Civil Rights Act was designed to address the national concern for civil rights. *See Katzenbach v. McClung,* 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964). The Commerce Clause is an appropriate vehicle for Congress to address issues of national concern where purely interstate activity in the aggregate substantially affects commerce. There is a compelling need for Congress to address issues affecting commerce such as unfair competition, economic crises and civil rights. However, unlike the Civil Rights cases, there is *no compelling need* for Congress to apply the FAA to private contracts unless the effect upon interstate commerce is substantial. *See* Jeffrey Ghannam, *Serving Up Civil Rights,* 87 A.B.A. J. 44 (2001).

[11] Justice Kennedy expressed his concern about exercise of federal power where "neither the actors nor their conduct have a commercial character" at least in part because "any conduct in this interdependent world of ours has an ultimate commercial origin or consequence." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

issue (local delivery of newspapers) to determine whether the aggregate effects substantially affect interstate commerce, the Alabama Supreme Court focused on the commercial and economic effects of publication of *The News* in general. The Alabama court recognized that "[t]he Agreement required [petitioners] to distribute advertising inserts designated by The News as part of the complete newspaper, which were prepared, printed, and shipped to The News in interstate commerce, and news content, designated as part of the complete newspaper by The News that was obtained by The News in interstate commerce."[12] (App. A6).

In his dissent in *Sisters of the Visitation*, Chief Justice Hooper reasoned that *Lopez* did not apply to arbitration cases because he concluded that *all arbitration cases* involve purely commercial activities. *Sisters of the Visitation*, *12 (Hooper, C. J., dissenting). That conclusion formed the basis for the Alabama Supreme Court's decision in this case. In other words, the Alabama Supreme Court believed that the analysis under *Lopez*'s substantial effects test should cease when the intrastate activities being regulated are determined to be commercial.[13] This conclusion is fundamentally at odds

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[12] See *United States v. American Building Maintenance Indus.*, 422 U.S. 271 (1975) ("Simply supplying localized services to a corporation engaged in interstate commerce does not satisfy the 'in commerce' reguirement" of §7 of the Clayton Act.)

[13] *See United States v. Wall*, 92 F.3d 1444, 1462 (6th Cir. 1996) (Boggs, C.J. concurring in part and dissenting in part) ("Some have contended that analysis under *Lopez's* substantial effects test should cease when intrastate activities being regulated are determined to be commercial. I do not think that this is the proper way to read *Lopez*.").

with *Lopez*.[14] This Court could not have intended to imply that all commercial activities could be regulated when it said that the Guns Free Safety Zone Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 115 S.Ct. at 1130-31. Otherwise, the word "interstate" in the Commerce Clause would be rendered a nullity. *See also Solid Waste Agency v. Army Corps of Engineers*, __v.s.__, 121 S. Ct. 675 (2001) ("We would have to evaluate the precise object or activity that, in the aggregate, substantilly affects interstate commerce.").

The aggregate commercial effect in this case was purely intrastate. The economic activity arising out of the Agreement was limited to Birmingham, Alabama. Only by resorting to so exaggerated a level of generality could the Alabama Supreme Court identify any effect on interstate commerce. Moreover, there was no effort by the Alabama Supreme Court to identify any *substantial*

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[14] The Alabama Supreme Court has been inconsistent in its application of this Court's holdings in *Lopez* and *Morrison* to arbitration cases. The Alabama Court initially refused to apply *Lopez* to arbitration cases. See *Hurst v. Tony Moore Imports, Inc.*, 699 So. 2d 1249, 1257 (Ala. 1997)(plurality opinion)("we do not view *Lopez* as signaling a retreat by the Supreme Court from its expansive interpretation of 'interstate commerce' in cases clearly involving commercial transactions"). The Court later embraced the concept that the *Lopez* requirement of substantial effect governed the question of whether a particular contract has a sufficient connection with interstate commerce to be governed by the FAA. See *Sisters of the Visitation v. Cochran Plastering Co. Inc.*, No. 1981513, 2000 WL 264243 (Ala. March 10, 2000); *Southern United Fire Ins. Co. v. Knight*, 736 So. 2d 582 (Ala. 1999); *Rogers Foundation Repair, Inc. v. Powell*, 748 So.2d 869 (Ala. 1999). The court has now come full circle in this case by retreating from *Lopez*.

effect on interstate commerce, the Alabama Supreme Court dispensed with any meaningful limits on the commerce power. Thus, the lower court's holdings are generally too broad and are in disharmony with *Lopez* and *Morrison*.

B. Any Link Between the Local Delivery of Newspapers and Interstate Commerce Is Too Attenuated a Connection to Interstate Commerce.

The final factor under *Morrison* requires an attenuation analysis. In *Morrison*, this Court cautioned against accepting an "attenuated" connection between the regulation and the interstate activity.[15] *Morrison*, 115 S. Ct. at 1750. The Court noted that the rationale supporting the Violence Against Women Act would justify federal regulation of "any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption," along with other areas of traditional state regulation whose "aggregate effect ... on the national economy is undoubtedly significant." (*Id.* at 1752-53). Concerned that casual, "but-for" arguments could lead to an evisceration of any limitations on federal power, the Court held Congress to a more direct link. *Id.*

The Alabama Supreme Court's opinion conflicts with *Lopez* and *Morrison* with respect to this factor. Any supposed link between the local delivery of newspapers and interstate commerce, if one exists, would be so

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[15] In *Lopez*, the Court emphasized that the government's reasoning would permit Congress to "regulate not only all violent crime, but also all activities that might lead to violent crime," as well as any activity "related to the economic productivity of individual citizens." 514 U.S. at 564.

attenuated that it could be used to also justify a general federal police power of all contracts. The "flow" rationale relied on by the Alabama Supreme Court in this particular instance involves a causal chain that *would never end*. Under this rationale, *everything* would affect interstate commerce.[16]

> Even assuming that ink, paper, advertising, news content and photographs were provided to The News in interstate commerce at some point during production of the newspaper, such a connection to interstate commerce is so nebulous that it provides no useful boundary under the Commerce Clause in evaluating whether local delivery of newspapers affects interstate commerce. According to *Morrison*, allowing such remote factors to govern constitutional limitations would allow Congress to "completely obliterate the Constitution's distinction between national and local authority. *Morrison*, 120 S. Ct. at 1752.

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[16] The Alabama Supreme Court's opinion is a clear example of what this Court cautioned against in *Maryland v. Wirtz*: the use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968). See also *Gulf Oil Corp. v. Copp Paving Co., Inc*, 419 U.S. 186, 198 (1974) (a "chain of connection" that "ha[d] no logical endpoint resulted in "nebulous" jurisdictional limits and did not provide an acceptable "'nexus' to commerce"); *FERC v. Mississippi*, 456 U.S. 742, 759 n.23 (1982) (Congress may not "regulate in an area that is only tangentially related to interstate commerce").

II. The Decisions of the Alabama Supreme Court Is Erroneous as a Matter of Statutory Interpretation and Constitutional Law.

There is no question but that The News engages in interstate commercial activity with respect to the publication of its newspaper. However, the Alabama Supreme Court concluded that the "flow" of interstate commerce did not end with publication of *The News*, and that as a result, petitioners were an integral part of a system for delivering commercial advertising distributed in interstate commerce. In reaching this conclusion, the court relied on *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) and *Evening News Publ'g Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir. 1959), *cert. denied*, 360 U.S. 929 (1959).

Both of these cases involved attempts by newspaper companies, which enjoyed dominant positions as regional newspapers, to restrain interstate commerce. The cases dealt specifically with whether federal court jurisdiction existed under the Sherman Act, 15 U.S.C. § 1, *et seq*. In neither of these cases did the Court hold that the interstate character of a newspaper business was the determining factor for federal jurisdiction. See *Page v. Work*, 290 F.2d 323, 331 (9th Cir. 1961). The relevant Congressional scheme involved in the *Lorain Journal* and *Evening News* cases was preventing monopolies and restraints of trade.

This case involves the Federal Arbitration Act, a statute requiring arbitration of contracts involving interstate commerce. A statute designed to protect competition is not interchangeable with a statute authorizing arbitration between private parties. It is true that both the antitrust statute and the FAA are grounded in

the authority conferred upon Congress by the Commerce Clause. However, the nexus between the applicability of the statute to local transactions and the fulfillment of the Congressional scheme is not nearly as direct or logical in the context of a statute calling for arbitration of disputes arising from contracts involving interstate commerce as it is in the context of a statute regulating competition. (App. A13).

The decision of the Alabama Supreme Court is simply erroneous. The Fourth Circuit Court of Appeals addressed a similar argument and held the opposite. The argument in *Schroepfer v. A.S. Abell Co.*, 138 F.2d 111 (4th Cir. 1943), *cert. denied*, 321 U.S. 763 (1944), was that rackmen, who were engaged in the local distribution of newspapers after they had been printed, were integral parts of the flow of interstate commerce. The federal appellate court rejected the argument:

> It is argued that what plaintiffs do is merely a part of the interstate gathering and distribution of news in which defendant is engaged; that the process which begins with the collection of news, admittedly an interstate activity, is not ended until the paper is placed in the hands of the customer or reader; and that plaintiffs' work is an integral part of the process. The fallacy of the argument consists in assuming that defendant is engaged in the sale of news. As a matter of fact it is engaged herein in the sale of papers. It is news, of course, that makes the papers valuable; but it is the papers, not the news, that it is selling. If the sale of papers be regarded as the sale of news, it is news processed in the course of publication into an entirely new article of commerce. When papers are sold across the state lines, interstate commerce is involved in such

> sale. When the news printed or the material used in the paper is transported cross state lines interstate commerce is necessarily "affected" by anything that affects the publication and sale of papers. *By no possible construction, however, can sale or transportation of papers within the state of their publication be said to be in itself interstate commerce.* The publisher of a newspaper is a manufacturer of the printed papers. News reports, paper stock, ink and everything else that goes into the making of the papers are raw materials that he uses in their manufacture; and these raw materials lose their identity and the interstate character which may have attended them when given this new form. A sausage manufacturer who sell this product intrastate would hardly be said to be engaged in interstate commerce with respect to such intrastate sales merely because he purchases the materials that go into the sausages in interstate commerce. Yet this would be just as sensible as to say that local sales of a newspaper are in interstate commerce because news is acquired for publication in the paper through an interstate service.

138 F.2d at 114. (emphasis added).

The *Schroepfer* court concluded that "[t]here could hardly be a more purely intrastate activity than the sale of newspapers in a particular small part of a large city, especially where the newspaper is locally produced in the same city." *Id.* The Alabama Supreme Court reached an erroneous conclusion because it focused on the commercial effect of *publication* of *The News* in general rather than on the effect of the *local delivery* of newspapers. Petitioners deliver newspapers in the same city in which the newspaper is locally produced.

They are not integral parts of the flow of interstate commerce. The decision of the Alabama Supreme Court is erroneous as a matter of statutory interpretation and constitutional law.

III. The Questions Presented Are Important.

The questions presented are sufficiently important for this Court to review. If *Lopez* and *Morrison* recognize meaningful limits on Congress's Commerce Clause power, this Court must definitively articulate those limits to guide lower courts in their analysis and application of federal statutes. The questions presented in this case can be expected to recur frequently in the future as arbitration cases are dominating the lower courts.[17] Unless this Court provides guidance, the lower courts will continue to struggle with the application of this Court's holdings in *Lopez* and *Morrison* to arbitration cases. Prompt resolution of the important and recurring issues in this case is necessary to give lower courts much needed guidance on the proper application of the aggregation principle.

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[17] In the three years preceding November, 2000, the Alabama Supreme Court rendered 135 arbitration-related decisions. *See* David G. Wirtes, Jr., *Suggestions for Defeating Arbitration*, 24 Am.J. Trial Advoc. 111 (2000). Since November, 2000, the Court has rendered 22 such decisions. In the majority of the arbitration-related cases decided by the Alabama Supreme Court, the issue on appeal dealt with interstate commerce challenges. *See also* Thomas J. Methvin, *Alabama - The Arbitration State*, 62 Ala. Law. 48 (2001); F. M. Haston, III, *Arbitration in Alabama - Of Road Signs and Reality*, 62 Ala. Law. 62 (2001); Caroline E. Mayer, *"Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided,"* The Wash. Post, March 1, 2000, at E01. (Of the 51,622 arbitration claims initiated by First USA (a credit card company), company won 99.6% of the cases in arbitration.)

The Alabama Supreme Court upheld federal regulation of a contract which is neither commercial in nature nor interstate when it found that the petitioners' transactions with The News were integral and inseparable parts of the flow of interstate commerce. The effect of the opinion is that courts are entitled to "automatically" conclude that proximity to interstate contracts in and of itself warrants the conclusion that the subject contract substantially affects interstate commerce. The court's opinion advocates an extreme and absolute rule that in reality subjects all contracts to the FAA. It would be difficult to envision any contract that would be immune from federal control.

The lower court's holding demonstrates how courts can evade the holding of *Lopez* by categorizing conduct at an exceedingly high level of generality. The proper focus should be on the contract between the parties and the question should be whether performance of the contract by petitioners substantially affects interstate commerce. Any other rule would, in reality, subject all contracts to the FAA no matter how small or local and would thereby violate and further erode constitutional principles of federalism. As Justice Lyons recognized in *Sisters of the Visitation*:

> One cannot seriously argue that unless all transactions, some of which by themselves might have only a local influence or at most an indirect connection to interstate commerce, come within the scope of the FAA, that Act will become some sort of scarecrow, lacking substance and a field of operation, so that Congress's primary purpose will be defeated. Such an expansive application of the FAA would tend to defeat the doctrine of federalism, making that doctrine a hollow shell."

Sisters of the Visitation v. Cochran Plastering Co., Inc., No. 1981513, 2000 WL 264243 at *8-9 (Ala. March 10, 2000). It is essential to our system of government that the commerce power not extend to effects on interstate commerce that are so remote that we "would effectually obliterate the distinction between what is national and what is local." *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

REL: 09/22/2000

SUPREME COURT OF ALABAMA
SPECIAL TERM, 2000

1990418 and 1990419

Ex parte Hugh Stewart
Ex parte Kameron Hyde
PETITIONS FOR WRIT OF MANDAMUS
(Re: Hugh Stewart
v.
The Birmingham News Company;
and
Kameron Hyde
v.
The Birmingham News Company)
(Jefferson Circuit Court, CV-99-4313, and -4314))

PER CURIAM.

Hugh Stewart and Kameron Hyde, the plaintiffs in actions pending in the Jefferson County Circuit Court, have petitioned for a writ of mandamus directing the trial court to vacate its order compelling them to submit their claims to arbitration. We deny the writs.

The Birmingham News newspaper is published by The Birmingham News Company ("The News") and is sold through a mixed distribution system consisting of employees of The News and independent dealers ("Dealers") who are authorized to act as the exclusive distributors of the newspaper in specific geographical areas. The plaintiffs became Dealers by executing an "Independent News Dealer Agreement" (the "Agreement")

with The News — Stewart in 1988 and Hyde in 1994. Pertinent portions of the Agreement read:

"4. *Deliveries*:

"[Dealers] shall make regular and prompt deliveries on the date of publication of complete newspapers intact, including preprints, supplements, and inserts designed by [The News] only, to his subscribers and customers in a manner satisfactory to them (e.g., in a dry and readable condition). ...

"....

"8. *Term*:

"This Agreement shall exist and be in force until [one year from date of execution], and thereafter shall be automatically renewed from year to year unless terminated by either party by giving the other party written notice of termination on or before thirty (30) days prior to the annual renewal date. In the event of the failure of either party to perform any of its obligations under the Agreement, the other party may terminate this Agreement upon prior written notice, subject, however, to the provision of Paragraph 10 herein. Notice shall be given hereunder by depositing the same in the United States mail, postage prepaid, and addressed to the other party at his business hereinabove set out.

"....

"10. *Arbitration*:

"Except as herein provided, and as provided in any other provision of this Agreement, all claims

> and controversies arising out of this contract shall be submitted to arbitration for determination. It is agreed, however, that if either party shall terminate this contract by reason of the alleged breach thereof by the other party, the sole issues for determination shall be whether or not the termination was valid, whether or not either party shall be entitled to money damages, and, if so, the amount thereof, which issues only shall be submitted to arbitration. It is expressly agreed that in case of such termination neither party shall be entitled to have this Agreement reinstated nor to be restored to his or its status thereunder, notwithstanding the fact that it may be determined that the termination by the other party was not warranted. ..."

According to the plaintiffs, in 1997 The News made changes to its distribution system that adversely affected the Dealers' ability to function properly under the Independent News Dealer Agreement. For example, the plaintiffs contend that The News changed its customer-rating procedures in a way that caused Dealers to be held responsible for complaints about service problems over which they had no control. In 1998, The News notified the plaintiffs that their Agreements would not be renewed because, it said, complaints about their service "were at a totally unsatisfactory level."

Although the Agreement provided that either party could terminate it without cause by giving written notice 30 days before its expiration, the plaintiffs sued The News, each alleging that the Agreement obligated The News to act in good faith and to maintain a relationship with a Dealer as long the Dealer performed satisfactorily, and that the "unsatisfactory-performance" reason given for nonrenewal of their contracts was a

pretext. The plaintiffs claimed that The News had engaged in a scheme designed to eliminate the Dealers and to obtain their distributorships (which, the plaintiffs allege, had become very profitable over the years), without compensation, in order to obtain the Dealers' profits and to establish a monopoly in the newspaper publishing and retail-distribution market. The plaintiffs alleged breach of contract, fraud, conspiracy, violation of Alabama's antitrust statute (Ala. Code 1975, § 6-5-60), unjust enrichment, tortious interference with a business relationship, and deceptive trade practices.

The News moved to stay the proceedings in the circuit court and to compel arbitration pursuant to Paragraph 10 of the Agreement. The plaintiffs opposed the motion. After a hearing on the motion, the trial court granted it and ordered the parties to arbitrate. The plaintiffs now seek a writ of mandamus directing the trial court to vacate its order compelling arbitration of their claims against The News.

Mandamus is an extraordinary remedy and requires a showing of 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court. When an appellate court engages in mandamus review of a trial court's order granting a motion to compel arbitration, the appellate court applies a de novo standard of review. See *Ex parte Inverness Constr. Co.*, [Ms. 1981698, July 14, 2000], ___So. 2d___ (Ala. 2000); *Ex parte Stamey*, [Ms. 1981629, June 30, 2000] ___ So. 2d ___ (Ala. 2000); *Ex parte Roberson*, 749 ___ So. 2d ___ 441 (Ala. 1999).

In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), the United States Supreme Court held that the

words "involving commerce" in the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA"), are broader than the often-found words of art "in commerce." The Court held, therefore, that they cover more than only persons or activities within the flow of interstate commerce. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974) (defining "in commerce" as related to the "flow" and defining the "flow" to include "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer"). The Court went on to hold that the word "involving" is the functional equivalent of the word "affecting," and that the phrase "affecting commerce" normally signals a congressional intent to exercise its Commerce Clause powers to the full. 419 U.S. at 201.

The plaintiffs contend that nothing in the Agreement indicates that it involves interstate commerce within the meaning of the FAA; they further contend that an affidavit filed by The News in support of its motion merely established that *The News* engages in interstate commerce. The plaintiffs argue that the trial court erred by focusing, they say, on the "overall business" of The News rather than on the limited transactions evidenced by the Agreement.

The News bore the burden of proving to the trial court that the Agreement involved interstate commerce, so as to invoke the FAA and render enforceable the arbitration clause in the Agreement. *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] ___ So. 2d ___ (Ala. 2000); *Transouth Fin. Corp. v. Bell*, 739 So. 2d 1110 (Ala. 1999).

Attached to The News's motions to stay the civil actions and to compel arbitration were affidavits of Toby

Pearson, the circulation director for The News. In his affidavits, Pearson acknowledged that the plaintiffs and The News had entered into the Agreement and that under the Agreement the plaintiffs bought complete newspapers from The News and distributed them to homes, newsstands, news racks, and other places within defined territories for the period of a year. Pearson affirmed:

> "3. Virtually all of the inserts that are included as part of *The Birmingham News*, such as Sunday comics, Parade magazine, React magazine, and advertising inserts for national retail chains such as Rich's, Sears, and others, are prepared, printed, and shipped to The News from companies located outside the State of Alabama.
>
> "4. The News also obtains a significant portion of its news content and photographs from outside the State, under agreements with news services such as The Associated Press, Universal Press, Knight Ridder Tribune, and King Features."

The plaintiffs do not dispute this. Therefore, the Agreement required them to distribute advertising inserts designated by The News as part of the complete newspaper, which were prepared, printed, and shipped to The News in interstate commerce, and news content, designated as part of the complete newspaper by The News, that was obtained by The News in interstate commerce.

Did the flow of interstate commerce end when these inserts and this news content were delivered to The News? The plaintiffs contend it did, and the dissenting Justices agree. The plaintiffs cite the following cases to support their contention: *United States v. American*

Bldg. Maintenance Indus., 422 U.S. 271 (1975); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Burke v. Ford*, 377 F.2d 901 (10th Cir. 1967); *Page v. Work*, 290 F.2d 323 (9th Cir. 1961); *Wirtz v. M & B Constr. Co.*, 216 F. Supp. 169 (S.D. Fla. 1963); *Ouendag v. Gibson*, 49 F. Supp. 379 (W.D. Mich. 1943); *Hurst v. Tony Moore Imports, Inc.*, 699 So. 2d 1249 (Ala. 1997).

The News contends that the plaintiffs were an integral part of a system for delivering commercial advertising distributed in interstate commerce, citing, among other cases, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); and *Evening News Publ'g Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir. 1959), cert. denied, 360 U.S. 929 (1959).

In *Lorain Journal*, the United States Supreme Court analyzed the interstate activity of a daily newspaper located in Lorain, Ohio:

> "The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved."

342 U.S. at 152.

The United States Court of Appeals for the Third Circuit reached the same conclusion in *Evening News*, which involved a group of news dealers who tried to force a newspaper to eliminate home delivery of some of its newspapers by newsboys. The newspaper sued the dealers, alleging violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The dealers argued, as the plaintiffs argue here, that their relationship with the

newspaper was intrastate in nature because they delivered newspapers only within their home state. The Third Circuit disagreed with the dealers:

> "The truncated argument advanced would have us forget completely that interstate commerce is an inseparable, indispensable part of this ... newspaper. The News does furnish neighborhood, city, county and state news to its readers. And by far the major portion of its sales are in New Jersey. But an essential element of its being (perhaps considering its territory and the present state of this world of ours its most essential element) is the obtaining, dissemination and interpretation of national and world-wide news. Intrastate advertising is necessary to the economic life of the paper and necessary to its readers. Interstate advertising affects the paper and its readers to a lesser degree but affect them it does appreciably. To place that news and advertising in the hands of New Jersey people requires, as the United States Supreme Court said in [*Lorain*], 'continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved in the sale and delivery of product[s] sold.' The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in [*Lorain*], '... an inseparable part of the flow of the interstate commerce involved.'"

263 F.2d at 717.

The Third Circuit found that "home delivery of the News is an integral part of the interstate operation."

263 F.2d at 717. We agree with the Third Circuit's application of *Lorain*, and we conclude that the cases of the plaintiffs now before us are not materially distinguishable from either *Lorain* or *Evening News*.[1]

The petitions for the writ of mandamus are due to be denied. The trial court properly directed arbitration pursuant to the arbitration clauses in the Agreement because the plaintiffs were integral and inseparable parts of the flow of interstate commerce. *Lorain* and *Evening News*.

1990418 — WRIT DENIED.

1990419 — WRIT DENIED.

Hooper, C. J., and Maddox, Brown, and Johnstone, JJ., concur.

Houston, J., concurs specially.

Cook, Lyons, and England, JJ., dissent.

See, J., recuses himself.

HOUSTON, Justice (concurring specially).

I go with the flow.

I concurred in *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] ___ So. 2d ___ (Ala. 2000). If, as the dissenting Justices contend, *Sisters of the Visitation* is precedent for granting these

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[1] We note that we have carefully examined all of the cases cited by the plaintiffs in support of their contention that the flow of interstate commerce ended when the inserts and the news were delivered to The News. We find those cases to be either distinguishable on their facts or otherwise consistent with the holdings in *Lorain* and *Evening News*.

mandamus petitions, then I misunderstood what I was voting on in *Sisters of the Visitation* and I should have concurred only in the result in that case. In my opinion, neither the words nor the reasoning of the majority opinion in *Sisters of the Visitation* has any precedential value in a case involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity.

LYONS, Justice (dissenting).

I respectfully dissent. The per curiam opinion ignores Chief Justice Rehnquist's description in *United States v. Lopez*, 514 U.S. 549 (1995), of the three categories of regulation subject to the power of Congress under the Commerce Clause of the United States Constitution, and it fails to distinguish *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] ___ So. 2d ___ (Ala. 2000).

Chief Justice Rehnquist in *Lopez* referred to the channels, instrumentalities, and activities having a substantial relation to commerce. We recognized these categories in *Sisters of the Visitation*.

The first category, regulation of the use of the channels of interstate commerce, involves management of the avenues of commerce and control over the items that might move through them, such as intoxicating liquors, convict-made goods, and stolen goods. *Lopez,* 514 U.S. at 558-59. See, also, *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) ("The term 'channel of interstate commerce' refers to, *inter alia*, 'navigable rivers, lakes, and canals of the United States; the interstate railroad track system; the interstate highway system; ... interstate telephone and telegraph lines; air traffic routes; television and radio broadcast frequencies.'" 214 F.3d at 490-91

(quoting *United States v. Miles*, 122 F.3d 235, 245 (5th Cir. 1997), *cert. denied*, 523 U.S. 1011 (1998)).

The second category, regulation of the instrumentalities of interstate commerce, protects things in interstate commerce, for example, by regulating the safety of motor vehicles. *Lopez*, 514 U.S. at 558-59; *Gibbs v. Babbitt*, 214 F.3d at 491. That an item may move in interstate commerce does not make it an instrumentality, or else the weapons shipped in interstate commerce giving rise to violations of the Gun-Free School Zones Act of 1990 would have sufficed to place 18 U.S.C. § 922(q), which was before the Supreme Court in *Lopez*, in the category of regulation of instrumentalities of commerce.

Based upon the illustrations given in *Lopez* dealing with the three categories, I conclude that the delivery of newspapers is not a channel of interstate commerce or an instrumentality of interstate commerce. A contract is neither a channel nor an instrumentality, but suggests instead an activity. The Federal Arbitration Act requires arbitration of "a contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and it defines "commerce" as "commerce among the several States or with foreign nations," 9 U.S.C. § 1. This case, therefore, falls in the third *Lopez* category, dealing with activities; therefore, as was held in *Lopez*, to be subject to regulation by the Congress, the activity must have a substantial effect on interstate commerce.

In order to decide the questions these plaintiffs present, we must, just as we did in *Sisters of the Visitation*, confront *Wickard v. Filburn*, 317 U.S. 111 (1942), where the Supreme Court upheld the constitutionality of regulation of homegrown wheat pursuant to an act of Con-

gress controlling prices of wheat. In *Lopez*, the Court referred to *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." 514 U.S. at 560. Recently, in *United States v. Morrison*, ___ U.S. ___, 120 S. Ct. 1740 (2000), the Court stated: "[I]n every case where we have sustained federal regulation under *Wickard*'s *aggregation principle*, the regulated activity was of an apparent commercial character." ___ U.S. at ___ n.4, 120 S. Ct. at 1750 n.4 (emphasis added). The Court's describing *Wickard* as "the most far reaching example" and its referring to "*Wickard*'s aggregation principle" suggest that *Wickard* is not a standard to be trotted out and applied willy-nilly whenever Congress attempts to regulate activities in interstate commerce. At stake in *Wickard* was Congress's attempt to control prices.

The aggregated effect of a determination that the activity in *Wickard* was wholly intrastate would have frustrated the Congressional purpose for controlling the price of wheat. In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and *Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir.), *cert. denied*, 360 U.S. 929 (1959), the two antitrust cases relied on by the per curiam opinion, the relevant Congressional scheme was to prevent monopolies and restraints of trade. In *Evening News*, the United States Court of Appeals for the Third Circuit observed:

> "The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in *Lorain* (342 U.S. at page 152, 72 S.Ct. at page 185), '*** an inseparable part of the flow of the

> interstate commerce involved.' That Court said further (342 U.S. at page 152, 72 S.Ct. at page 186), '*Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth.*' ... It should be noted that in *Lorain*, as here, the contention was that merely a local issue was in dispute."

263 F.2d at 717-18 ("outlets" emphasized in *Evening News*; additional emphasis added).

We here deal with the Federal Arbitration Act, a statute requiring arbitration of contracts involving interstate commerce. I do not consider a statute whose purpose is to control wheat prices across the country or a statute whose purpose is to protect competition to be interchangeable with a statute authorizing arbitration. Both the FAA and the antitrust statute are grounded in the authority conferred upon Congress by the Commerce Clause, but the nexus between the applicability of the statute to local transactions and the fulfilment of the Congressional scheme is not nearly as direct or logical in the context of a statute calling for arbitration of disputes arising from contracts involving interstate commerce as it is in the context of a statute establishing price controls or regulating competition.[2] The case for applying "*Wickard*'s aggregation principle" is therefore not as compelling in regard to the FAA as it is in regard to statutes purporting to control prices or prevent monopolies.

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[2] Justice Houston's special concurrence attempts to distinguish *Sisters of the Visitation* on the ground that it has no applicability in a case "involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity." ___ So. 2d at ___. I respectfully submit that such reasoning erroneously conflates the purpose of the statute and the purpose of the activity.

How, then, do we strike a balance that respects Congress's authority and upholds the rights of states over local matters? The United States Court of Appeals for the Fourth Circuit discussed this issue in *Gibbs v. Babbitt*, dealing with the constitutionality of an act regulating the taking of red wolves on private land, as follows:

> "*Lopez* and *Morrison* rest on the principle that where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power. Respect for our federal system of government was integral to those decisions. See *Lopez*, 514 U.S. at 561 n.3, 115 S.Ct. 1624; *Morrison*, [___ U.S. at ___,] 120 S.Ct. at 1754-55. Yet *Lopez* also counsels that '[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.' 514 U.S. at 560, 115 S.Ct. 1624. In enforcing limits on the Congress, we must be careful not to overstep the judicial role. To strike down statutes that bear substantially upon commerce is to overstep our own authority even as we fault Congress for exceeding limits on its power. The irony of disregarding limits on ourselves in the course of enforcing limits upon others will assuredly not be lost on those who look to courts to respect restraints imposed by rules of law."

214 F.3d at 491-92.

I would strike the balance by relying upon the standard we set in *Sisters of the Visitation*, a standard that allows us to focus intensely on the specific transaction

before the Court. While that standard considers other interstate contracts of one of the parties that operate in proximity to the contract before the Court ("proximity contracts"), it avoids automatically concluding that proximity to interstate contracts alone warrants the conclusion that the subject contract substantially affects interstate commerce. We held in *Sisters of the Visitation*, after creating a hypothetical transaction involving a farmer mowing pasture lands, a transaction that lacked a substantial effect on interstate commerce, as follows:

> "This hypothetical transaction — an agreement by the farmer to do work for another local landowner — might contain the following components: (1) a contract solely between two local parties, both of them engaging in activities that do not involve any person or entity in another State; (2) tools and equipment, which, although they moved in interstate commerce, were not purchased or leased solely for the farmer to perform the particular contract at issue; (3) substantially more than half of the amount paid to the farmer by the other landowner is allocable to the cost of the services rendered by the farmer, who renders those services without using persons or entities from another State, while substantially less than half of the amount paid is allocable to the cost of materials specially purchased for use or consumption in the farmer's performance of the contract; (4) the object of the services is incapable of subsequent movement across State lines or otherwise having a subsequent substantial effect on interstate commerce; (5) such a degree of separability from any contracts that are subject to the FAA that allowing this contract to remain outside the scope of the Act would not

> substantially disrupt activities that Congress intended to be subject to the Act."

___ So. 2d at ___. In the situation of theplaintiffs now before us, we have no material deviation toward interstate commerce from the hypothetical transaction described above.

In each of the two cases before us, the parties to the transaction are local, but one party, The News, is engaged in an activity that involves numerous contracts between it and out-of-state entities that provide a range of materials and services, including comics, *Parade* magazine, advertising inserts, news content, photographs, paper, and ink. Some of the printed materials expressly solicit interstate business transactions between advertisers and subscribers. The Dealers purchase polyethylene bags and rubber bands from The News. The News obtains these products from outside the State of Alabama. We, therefore, have a deviation toward interstate commerce from the hypothetical transaction based upon the relationship of the parties to other contracts, to which I will return later.

The News makes no showing as to whether equipment, such as delivery trucks and other vehicles necessary to perform the distribution contracts, moved in interstate commerce to the Dealers or were acquired for performance of this contract and used solely in performance of the contract. We have no deviation toward interstate commerce from the hypothetical transaction based upon equipment necessary for the performance of the contract.

The News makes no showing as to the breakdown between the cost of local labor versus the cost of materials of interstate origin, such as equipment and gaso-

line necessary to the performance of the contract. We have no deviation toward interstate commerce from the hypothetical transaction based upon the costs attributable to interstate, as opposed to local, activity.

The newspapers subject to the contract are delivered locally. Any subsequent entrance into interstate commerce as a result of a local subscriber's mailing a clipping to another state is too incidental to warrant further consideration. The subscriber could respond to a solicitation for sale of a product from outside Alabama. However, we have no evidence as to the extent of such activity. We have no deviation toward interstate commerce from the hypothetical transaction based upon subsequent effect on interstate commerce.

The aforementioned proximity contracts are not linked to a showing that litigation, as opposed to arbitration, in connection with The News's contract with the Dealers, would disrupt performance of those proximity contracts with third parties. Indeed, we have no basis on which to conclude that the parties or potential witnesses to these proximity contracts have anything to do with the contract between The News and the Dealers. We have no deviation toward interstate commerce from the hypothetical transaction based upon disruption of proximity contracts with third parties.

The most difficult portion of the test is determining the effect of the proximity contracts and the Dealers' purchases from The News of materials that it obtains from outside Alabama. The materials resulting from the proximity contracts come to rest in Alabama, where The News processes and assembles the completed product. The advertising inserts do not move directly between the Dealer and the merchant purchasing the

advertising. While the contract requires the Dealers to deliver the inserts, that activity is local. The rubber bands and polyethylene bags sold by The News to the Dealers come to Alabama and then are resold by The News to the Dealers. However, there is no indication that the dispute between the parties relates to the sale of these products.

Unquestionably, The News substantially affects interstate commerce in the performance of its proximity contracts. However, the separate contract for the distribution of newspapers affects interstate commerce only to the extent that (a) the contract requires involvement by the Dealers in interstate commerce to perform the contract for distribution, or (b) the distribution itself causes subscribers to purchase goods or services directly from outside Alabama. Based on the absence of evidence to quantify interstate activity in these areas, I am unable to conclude that the performance of the contract between the Dealers and The News has the requisite substantiality of effect on interstate commerce to justify applying the Federal Arbitration Act. To hold otherwise would assume that the framers of the United States Constitution intended that Congress could require arbitration of a contract between a local newspaper and a young person in the neighborhood who throws papers from his or her bicycle.

I must dissent, lest we give too much weight to the interstate activity of The News and thereby disregard the proper focus on the contract between The News and the Dealers and the question whether that contract substantially affects interstate commerce.

Cook, J., concurs.

APPENDIX B

REL: 12/01/2000

SUPREME COURT OF ALABAMA
OCTOBER TERM, 2000-2001

1990418 and 1990419

Ex parte Hugh Stewart
Ex parte Kameron Hyde
PETITIONS FOR WRIT OF MANDAMUS
(Re: Hugh Stewart
v.
The Birmingham News Company;
and
Kameron Hyde
v.
The Birmingham News Company)
(Jefferson Circuit Court, CV-99-4313, and -4314))
On Applications for Rehearing

PER CURIAM.

APPLICATIONS OVERRULED.

Hooper, C. J., and Maddox, Brown, and Johnstone, JJ., concur.

Houston, J., concurs specially.

Cook, Lyons, and England, JJ., dissent

See, J., recuses himself.

HOUSTON, Justice (concurring specially).

I go with the flow.

I concurred in *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] ___So. 2d___ (Ala. 2000). If, as the dissenting Justices contend, *Sisters of the Visitation* is precedent for granting these mandamus petitions, then I misunderstood what I was voting on in *Sisters of the Visitation* and I should have concurred only in the judgment in that case. In my opinion, neither the words nor the reasoning of the majority opinion in *Sisters of the Visitation* has any precedential value in a case involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity.

In opposition to the applications for rehearing, the Birmingham News Company filed an excellent brief, which I quote from and adopt as part of my special concurrence:

> "[The Supreme Court of Alabama's majority opinion] fits within the broad general category of cases that recognize the authority of Congress to regulate persons or things that are in some sense participating 'in' interstate commerce. See *Reno v. Condon*, 528 U.S. 141 (2000); *United States v. Lopez*, 514 U.S. 549, 557 (1995) ('Congress is empowered to regulate and protect the instrumentalities of interstate commerce, *or persons or things in interstate commerce*, even though the threat may come only from intrastate activities') (emphasis added); Lawrence H. Tribe, American Constitutional Law, § 5-5, at 826 (3d ed. 2000) ('[a]lthough the Court might more comfortably have described it as a separate category, *Lopez* located the regulation of "persons or things 'in' interstate commerce," or "participating in" such commerce, in the instrumentalities branch of the Court's Commerce Clause

> doctrine'). The analysis or test described in *Sisters of the Visitation* does not apply to cases like this one, where the actual persons and things involved are themselves within the flow of commerce. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974) (which defined 'in commerce' as related to the 'flow' and defining the 'flow' to include 'the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer'). Such persons and things, by definition, substantially affect — because they are components of — interstate commerce. See Lawrence H. Tribe, American Constitutional Law, § 5-5, at 827 (3d ed. 2000).

"Judicial recognition of a 'flow' of interstate commerce is not new. In 1905, Justice Holmes wrote as follows:

> " '[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, *the current thus existing is a current of commerce among the States*, and the purchase of the cattle is a part and incident of such commerce.'

"*Swift & Co. v. United States*, 196 U.S. 375, 399 (1905) (emphasis added). In 1943, in an opinion by Justice Douglas, the United States Supreme Court again discussed the movement of goods in a 'current' of interstate commerce and the authority of Congress to regulate it,

as well as those who participate in it. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). In *Walling*, the Court found that the flow of interstate commerce did not necessarily cease once goods were delivered to a wholesaler located in the state of destination:

> " 'It is clear that the purpose of the [Fair Labor Standards Act] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication ... that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency ... if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.'

"*Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-68 (1943). Finding that the wholly intrastate delivery of various paper products (including newsprint) was subject to Congressional regulation, the Court held that the

products remained 'in commerce' because they had been ordered pursuant to preexisting contracts or understandings with customers. Under such circumstances,

> " 'a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate.'

"317 U.S. at 568-69. *Walling* stands for the proposition that temporary stops in an interstate journey of merchandise to a predetermined destination do not necessarily interrupt the flow of commerce. See, e.g., *Stewart-Jordan Distrib. Co. v. Tobin*, 210 F.2d 427 (5th Cir.), cert. denied, 347 U.S. 1013 (1954).

"This Court's decision of September 22[, 2000] is consistent with the principles described in *Walling*. The newspapers distributed by Stewart and Hyde were subject to preexisting orders in the form of subscriptions. Those subscriptions required that Stewart and Hyde deliver news, features, news magazines, and commercial advertising inserts (all of the 'preprints, supplements, and inserts' designated for delivery pursuant to

their agreements) in a timely manner on the day of publication to the subscriber. Much of the news content, many of the photographs, and virtually all of the news magazines, special features, and commercial advertising inserts were published and prepared in their entirety outside of Alabama for distribution to the subscriber. As the United States Supreme Court found in *Walling*, the preexisting order — the subscription — by the ultimate subscriber 'indicates where it is intended that the interstate movement should terminate.' *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568-69 (1943). To find that the purpose for the production of such news and advertising was for it to be delivered to The News would be to 'allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.' 317 U.S. at 567-68.

"The conclusion reached in this case concerning the intrastate distribution of news, features, and commercial advertising moving in interstate commerce is consistent with the conclusions reached by other courts.* In 1998, for example, the United States District Court for the Middle District of Georgia found that district managers of a newspaper 'engaged in' interstate commerce when they delivered newspapers to readers. The court held that, because the newspapers contained supplements and other material printed outside of Georgia, the district managers became part of a 'practical continuity of movement' of interstate commerce when they delivered the newspapers to readers within Georgia. *Webb v. Athens Newspapers, Inc.*, 999 F. Supp. 1464 (M.D. Ga. 1998). In 1972, the United States District Court for the Central District of California found that a news dealer was an inseparable part of the flow of interstate commerce because the newspaper he distrib-

uted contained news, feature material, comics, and other information that had moved in interstate commerce. *Dahl v. Hearst Corp.*, [No. 72-2107, December 13, 1972] (C.D. Cal. 1972) [not published in F. Supp.]; see also *Wirtz v. Universal Adver. Serv.*, 258 F. Supp. 542 (N.D. Okla. 1966) (similar holding with respect to the distribution of advertising circulars, handbills, and similar printed matter).

"In summary, Stewart and Hyde have not pointed to any misapprehension of fact or law on the part of this Court. The opinion of September 22 is not at odds with *Sisters of the Visitation*, because this Court properly found that Stewart and Hyde were integral and inseparable parts of the flow of interstate commerce.

"*The decisions of the United States Supreme Court in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and that of the [United States Court of Appeals for the] Third Circuit in *Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir. 1959), cert. denied, 360 U.S. 929 (1959), are hardly the relics that Stewart and Hyde would have this Court believe."

APPENDIX C

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CASE NO. CV99-4313

HUGH STEWART,
Plaintiff,
vs.
THE BIRMINGHAM NEWS COMPANY,
Defendant.

ORDER

THIS CAUSE was heard on the Defendant, The Birmingham News Company's ("The News"), Motion to Stay Civil Action and to Compel Arbitration. Counsel for all parties were present and presented arguments in support of and in opposition to said Motion.

The Plaintiff, Hugh Stewart, entered into an independent news dealer agreement with the Defendant which provides in pertinent part that the Defendant would sell to the Plaintiff its complete newspaper, including, reprints, supplements and inserts and that the Plaintiff would make regular and prompt deliveries of the complete newspaper to the ultimate consumer in a designated area. The agreement contains a provision providing for arbitration of all claims and controversies arising out of the contract and it is undisputed that both parties voluntarily entered into the agreement with knowledge that the arbitration provision was contained therein. The Plaintiff contends that the agreement was executed in Alabama between an Alabama corporation and a resident citizen of Alabama and that the complete

transaction, including, the sale of the complete newspaper to the Plaintiff by the Defendant occurred in Alabama and the delivery by the Plaintiff to the ultimate consumer was to a designated area, also, entirely within Alabama. The Plaintiff, therefore, contends that the arbitration provision is inapplicable because this entire transaction does not involve interstate commerce.

On the other hand, The News contends that the products necessary to prepare the newspaper, including, the paper, ink, rubber bands and plastic containers all came from outside the State of Alabama and therefore involved interstate commerce. The News further contends that the newspaper itself contains reprints, supplements and inserts that were prepared outside the State of Alabama and shipped to The News to be included in its newspaper to be delivered to the ultimate consumer. The News further contends that the newspaper, reprints, supplements and inserts included advertisements for companies outside the State of Alabama which are designed to encourage the ultimate consumer to purchase their products which were manufactured and distributed in interstate commerce. The News contends that these factors evidence a transaction affecting interstate commerce and therefore the arbitration provision is applicable.

In determining whether the Federal Arbitration Act applies to a transaction within the state a two-pronged test is applied. That standard is that the FAA applies to a contract if:

1. The contract was one involving interstate commerce; and

2. The contract contained an arbitration agreement voluntarily entered into by the parties. *Ex parte Ala-*

bama Oxygen Company, 433 So.2d 1158 (Ala. 1983). In this case it is undisputed that there was an arbitration clause in the contract and therefore the only question is whether the contract was one involving interstate commerce. The requirement of the FAA that an arbitration agreement "involved commerce" has been construed very broadly so that the slightest *nexus* of the agreement with interstate commerce will bring the agreement within the ambit of the FAA. *Ex Parte Coster and Head (Atrium) Limited*, 486 So.2d 1272 (Ala. 1986). In *Hurst v. Tony Moore Imports, Inc.*, 699 So.2d 1249 (Ala. 1997) our Court in a plurality decision, explained that the United States Supreme Court precedent indicates that even an intrastate transaction "involves" interstate commerce if it has virtually any tangible effect on the generation of goods or services for interstate markets and their distribution to the consumer. *Delta Construction Corporation v. Gooden*, 714 So.2d 1975 (Ala. 1988). The Court finds that the sale and distribution of newspapers that include reprints, inserts and supplements, as in this case, substantially affects interstate commerce in that one of its expressed purposes, in addition to providing current news, is to provide a means for advertisers to solicit consumers to purchase their goods and services not only in Alabama but in other states. The Court finds that this purpose and the means to accomplish it distinguishes the newspaper business from the janitorial service business as described in *United States v. American Building Maintenance Industries*, 422 US 271, 91 S.Ct. 2150 (1975).

It is, therefore, ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Stay Civil Action and Compel Arbitration is GRANTED. This action is stayed and all claims asserted in the Complaint

against the Defendant, The Birmingham News Company, shall be submitted to arbitration pursuant to the terms of the arbitration agreement entered into between the parties.

DONE and ORDERED this the 27th day of October, 1999.

G. WILLIAM NOBLE
CIRCUIT JUDGE

cc: all parties

APPENDIX D

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CASE NO. *CV99-4314*

KAMERON HYDE,
Plaintiff,
vs.
THE BIRMINGHAM NEWS COMPANY,
Defendant.

ORDER

THIS CAUSE was heard on the Defendant, The Birmingham News Company's ("The News"), Motion to Stay Civil Action and to Compel Arbitration. Counsel for all parties were present and presented arguments in support of and in opposition to said Motion.

For the reasons set forth in this Court's Order in *Hugh Stewart v. Birmingham News Company*, CV99-4313 the Motion to Stay and to Compel Arbitration is due to be granted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this action is stayed and all claims against the Defendant, The Birmingham News Company, shall be submitted to arbitration pursuant to the arbitration agreement between the parties.

DONE and ORDERED this the 27th day of October, 1999.

G. WILLIAM NOBLE
CIRCUIT JUDGE

cc: all parties

APPENDIX E

REL: 11/3/2000

SUPREME COURT OF ALABAMA
OCTOBER TERM, 2000-2001

1990700
The Birmingham News Company
v.
Sherry Horn

Appeal from Jefferson Circuit Court
(CV-99-4243)

JOHNSTONE, Justice.

This appeal involves an identical agreement and presents the same issue addressed by this Court in *Ex parte Stewart*, [Ms. 1990418, September 22, 2000] ___ So. 2d ___ (Ala. 2000). Therefore, on the authority of *Ex parte Stewart*, we reverse the trial court's order denying the motion to compel arbitration filed by The Birmingham News Company, and remand this cause for entry of an order granting the motion to compel arbitration.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Maddox, Houston, Brown, and England, JJ., concur.

Hooper, C.J., concurs in the result.

Cook and Lyons, JJ., dissent.

See, J., recuses himself.

COOK, Justice (dissenting).

I respectfully dissent, for the same reasons expressed by Justice Lyons in *Ex parte Stewart*, [Ms.1990418, September 22, 2000] ___ So. 2d ___ (Ala. 2000) (Lyons, J., dissenting).

Lyons, J., concurs.

APPENDIX F

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

SHERRY HORN, an individual,
Plaintiff,
vs.
THE BIRMINGHAM NEWS COMPANY,
Defendant.

CASE NO. *CV-99-4243*

ORDER

This matter came before the Court on defendant's Motion to Stay Civil Action and Compel Arbitration, which was opposed by Plaintiff. On November 2, 1999, the parties presented arguments in support of and in opposition to said Motion.

Plaintiff, a Birmingham resident, entered into an Independent News Dealer Agreement with The Birmingham News Company (the News") in February 1998. The Independent News Dealer Agreement ("Agreement") executed by the parties contains a provision providing for arbitration of all claims and controversies arising out of the contract. The Plaintiff contends that the Federal Arbitration Act ("FAA") does not apply because the Agreement is not a transaction involving interstate commerce. 9 U.S.C. § 2.

The Agreement provides that Plaintiff would purchase from Defendant newspapers for resale to residential and business customers in her specific territory located in the Birmingham area. Pursuant to said

contract, Plaintiff agreed to make regular and prompt deliveries of the newspaper to her customers. This lawsuit was filed after the News failed to renew Plaintiff's Agreement. The Plaintiff alleges that the News is guilty of fraud in representing to her that the Agreement would be renewed so long as she performed satisfactorily. In addition to the alleging fraud in the inducement, Plaintiff's Complaint contains allegation of civil conspiracy, breach of contract, violation of Alabama's Antitrust Act, unjust enrichment, tortious interference with business relationship and deceptive trade practices.

In considering the issues presented in this case, the Court has been mindful of the Alabama Supreme Court's description of the burdens of the respective parties regarding a motion to compel arbitration. The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract involves a transaction affecting interstate commerce. Once a party presents such evidence, the burden shifts to the party opposing arbitration to present some evidence indicating that there is no arbitration agreement subject to specific enforcement under the FAA. *See Ex Parte Caver*, [ms. 1981070], 1999 WL 667294 (Ala. Aug. 27, 1999).

In support of its motion to compel arbitration, the Defendant submitted an affidavit of its Circulation Director. The gist of this affidavit is that certain components of the newspaper, including inserts, news content, ink, advertisements and product samples, come from outside the State of Alabama; that the Birmingham News is sold outside Alabama; and that certain dealers purchase from Defendant rubber bands and polyethylene bags which are manufactured by companies outside Alabama.

The Plaintiff argues that Defendant's affidavit proves only that the News engages in interstate commerce with others. The Plaintiff contends that she was never engaged in interstate commerce with regard to her Agreement because the flow of interstate commerce stopped at the News, which is incorporated in Alabama and has its principal place of business in Birmingham, Alabama. *See Hurst v. Tony Moore Imports, Inc.*, 699 So.2d 1249, 1253-1255 (Ala. 1997), *citing United States v. American Building Maintenance Industries*, 422 U.S. 217 (1975). The Plaintiff purchased a complete newspaper from Defendant; she did not purchase ink, news content, inserts or product samples. The negotiations regarding the Agreement took place in Birmingham. The newspapers were printed and assembled in Birmingham and were distributed by Plaintiff only to customers within a defined territory in the Birmingham area. Plaintiff purchased rubber bands and polyethylene bags from the News and not from any company outside the State of Alabama.

The Court agrees with Plaintiff that the transaction at issue — the Agreement – is not within the flow of interstate commerce. The Agreement is a purely intrastate transaction. Bur the question remains as to whether this intrastate transaction and a "substantial effect on the generation of goods or services for interstate markets and their distribution to the consumer." *See Southern United Fire Ins. Co. v. Knight*, [ms. 1971559], 1999 WL 181567 (Ala. April 2, 1999). As the News correctly asserted, even the slightest nexus of the Agreement with interstate commerce will bring the Agreement within the scope of the FAA. *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265 (1995). Yet nothing in the Agreement nor in the affidavit submitted

by Defendant shows a nexus, even a slight one, between the contract at issue and interstate commerce. The Agreement itself makes no reference to any interstate matters. *See Garikes, Wilson v. Episcopal Foundation*, 614 So.2d 447, 449 (Ala. 1993). This Court refuses to presume any substantial effect on interstate commerce absent any proof. *Jim Burke Automotive, Inc. v. Beavers*, 674 So.2d 1260, 1261 (Ala. 1995). The evidence submitted by the News pertains only to a flow of interstate commerce from sources outside Alabama to the News. Plaintiff has effectively rebutted this evidence with proof that the flow of commerce did not extend to her Agreement. It is the opinion of this Court that Defendant did not meet its burden of producing evidence that the Agreement between the parties involved interstate commerce.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Stay Civil Action and Compel Arbitration is DENIED.

DONE and ENTERED this the 23rd day of November, 1999.

WILLIAM A. JACKSON,
Circuit Judge

APPENDIX G

IN THE SUPREME COURT OF ALABAMA
February 23, 2001

1990700

The Birmingham News Company v. Sherry Horn (Jefferson Cir.Ct.No.: CV-99-4243)

ORDER

IT IS ORDERED that the application for rehearing filed in the above cause on November 17, 2000, be, and the same is hereby, overruled. NO OPINION.

JOHNSTONE, J. - Moore, C.J., and Houston, Brown, Harwood, Woodall, and Stuart, JJ., concur; Lyons, J., dissents.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23rd day of Feb., 2001.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX H

9 USC Sec. 1

"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

APPENDIX I

9 USC Sec. 2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.